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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 314

LOIS BOWDEN and ZADA SANDERS
Petitioners

v.

CITY OF FORT SMITH, ARKANSAS
Respondent

PETITIONERS' BRIEF

HAYDEN COVINGTON
Attorney for Petitioners

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Opinion Below

The opinion of the Arkansas Supreme Court is reported in 151 S. W. 2d 1000, and is printed in the record at pages 30 to 37. The trial court did not write an opinion.

Jurisdiction

Jurisdiction is invoked under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)], by petition for writ of certiorari. On March 16, 1942, this Court on its own motion set aside its previous order denying certiorari (October 13, 1942, 62 S. Ct. 99, 314 U. S. xxii) and granted certiorari. R. ....

Timeliness

The judgment of the state court of last resort (Arkansas Supreme Court) was rendered and entered of record on

June 9, 1941. (R. 29) The petition for writ of certiorari was filed July 28, 1941, and within three months from the date of such judgment.

The Statute

The legislation here drawn in question is an ordinance of the City of Fort Smith, Arkansas, in full force and effect at the time of the transaction involved herein, material parts of which ordinance are as follows:

"ORDINANCE No. 1172

"An Ordinance Entitled an Ordinance Amending Ordinance No. 1080, Fixing and Prescribing and Establishing the Rates of Certain License in the City of Fort Smith, Arkansas, and Repealing All Ordinances in Conflict Herewith.

Be it Ordained by the Board of Commissioners of the City of Fort Smith, Arkansas:

Section 1. That the license hereinafter named shall be fixed and imposed and collected at the following rates and sums and it shall be unlawful for any person or persons to exercise or pursue any of the following vocations of business in the city of Fort Smith, Arkansas, without first having obtained a license therefor from the city clerk and having paid for the same in gold, silver or United States currency as hereinafter provided.

Section 40. For each person peddling dry goods, notions, wearing apparel, household goods or other articles not herein or otherwise specifically mentioned $25 per month, $10 per week, $2.50 per day. A person,

firm or corporation using two or more men in their peddling business $50 per annum:

Section 3. The exercise of the privileges and business professions mentioned in this ordinance without having first obtained and paid for the amount of license required and provided for by this ordinance shall be unlawful and if any person exercising any of the same without license shall be deemed guilty of a misdemeanor and on conviction in the police court shall be fined in any sum not less than $5 nor more than $25 and that each day such business is carried on in violation of this ordinance shall constitute a separate offense and the prosecution in pursuance thereof shall in no wise affect the right of the city to proceed against such person or persons violating this ordinance in a civil action."

R. 14-15.

Statement

The petitioners are ordained ministers of Jehovah God and known as Jehovah's witnesses.

This is a criminal action. The petitioners were arrested on the 12th day of September, 1940, in the city of Fort Smith, Arkansas, and charged with an alleged violation of a peddling ordinance of that city.

They were charged and tried and convicted separately in the Municipal Court of Fort Smith and took separate appeals to the Sebastian Circuit Court, Fort Smith District thereof. The transcript of the appeals duly taken from the judgments convicting them of a violation of said peddling ordinance appears in the record. (R. 2-4) The hearing in Circuit Court was *de novo* at which time the case was submitted to the judge of the court, without a jury, on stipulated facts. The cases of the two petitioners and that of H. D. Cole, charged with violation of an ordinance prohibiting the distribution of handbills in the city on the streets, were con-

solidated and all three heard as one case. (R. 6, 7)

The hearing in the Circuit Court was had on October 25, 1940, upon an agreed statement of facts.

The substance of the stipulated facts upon which the case against the two petitioners is based is, to wit:

On or about the 12th day of September, 1940, the petitioners, Mrs. Lois Bowden and Miss Zada Sanders, were going from house to house in the residential section within the City of Fort Smith playing phonograph records upon which Bible lectures had been recorded at each house after having first secured permission. Also they were presenting to the residents of these houses various booklets, leaflets and periodicals setting forth their views of Christianity held by Jehovah's witnesses. These booklets, leaflets and periodicals were supplied to the defendants by the Watch Tower Bible and Tract Society at a stipulated price which these individual defendants paid before the books were delivered from the Watch Tower Bible and Tract Society of Brooklyn, New York. These defendants undertook to distribute these books to the residents of the City soliciting at the same time contribution of twenty-five cents ($0.25) for each book. Within the covers of these books setting forth the views of Christianity as held by Jehovah's witnesses is an advertisement or announcement setting forth the rates for which the books may be purchased in numbers from the Watch Tower Bible and Tract Society of Brooklyn, New York. These books in some instances are distributed free when the people wishing them are unable to contribute. Neither of these defendants had any license of any nature from the City of Fort Smith to distribute handbills of to sell or distribute books.

The literature in question was introduced in evidence as exhibits and clearly shows that it is devoted exclusively to explanation of Bible prophecy. The contents of this literature related to a revelation of said propheeies, recorded centuries ago, as they are now being fulfilled. The literature further showed that the time is near at hand when Jehovah,

the Almighty God, will completely destroy Satan and his entire organization, consisting of commercial, political and ecclesiastical elements, in the "battle of that great day of God Almighty" at Armageddon; which destruction shall be immediately followed by a complete establishment of God's Kingdom throughout the entire earth, to bring everlasting peace, joy, prosperity, happiness and everlasting life to all survivors of Armageddon and eventually also to many who have died in times past and who shall be resurrected to live forever upon earth. The contents, in part, are admittedly an attack upon religion as practiced today and at all times since man has been upon earth, but at the same time such books clearly set forth the true distinction between all organized religion and the true worship or service of Almighty God, which is Christianity. Such books thereby expose religion as a snare and a racket of the very worst kind, and that religion is in no way related to or a part of Christianity. For further explanation see the exhibits.

The stipulated facts and the findings of the court below are that this was the method employed by the petitioners to preach the gospel of God's Kingdom as ordained ministers of Jehovah God, which they did not for a selfish purpose, nor a commercial purpose, nor for pecuniary gain, but solely that persons of good-will toward Almighty God might be provided with knowledge of the way of life everlasting. That this work was done under direction of the benevolent and charitable corporation known as the Watch Tower Bible and Tract Society.

Petitioners did not apply for or obtain a license because as testified by them they were ordained ministers of Jehovah God preaching the Gospel in the exact manner commanded by Him and following in the footsteps of the Lord Jesus and the apostles, and to apply for a permit to do what Jehovah God commands them to do would be an insult to Almighty God, a violation of His law, which would result in their everlasting destruction. The petitioners testified that each as commanded by the Bible, chose to obey

God rather than man.'—Acts 20: 20.

The stipulated facts together with Exhibit B, ordinance in question, and Exhibit C, "Articles of Faith," appear in the printed record. R. 10-24.

At the conclusion of such hearing on October 25, 1941, the judge of the Circuit Court took the cases under advisement and on the 25th day of November, 1940, rendered judgment refusing petitioners' requested findings, overruling their motion to dismiss and adjudging petitioners guilty of violating the said ordinance 1172 of the City of Fort Smith, and assessed a fine of $5.00 against each petitioner. R. 8, 9.

Petitioners then timely filed their motion for new trial, complaining that the judgment should be set aside and a new trial granted. (R. 7, 8) The motion for new trial was overruled and an appeal allowed. R. 8.

In due time the appeals of the two petitioners and said Cole were jointly heard by the Supreme Court of Arkansas. On the 9th day of June, 1941, the said Supreme Court rendered a judgment affirming the Circuit Court's judgment of conviction of the petitioners and reversing the conviction of Cole. (R. 29, 30) On such date the said Supreme Court also filed its opinion giving its reasons for so affirming the case against petitioners and stating that the ordinance was applicable to petitioners, had not been wrongly applied, and that peitioners were not unlawfully deprived of any constitutional rights contrary to the due process clause of the Fourteenth Amendment. (R. 30-37)

Federal Questions Presented

By motion to dismiss duly filed in the Municipal Court, petitioners raised the Federal questions here presented, asserting that the ordinance was in violation of the Fourteenth Amendment to the United States Constitution in that the ordinance as construed and applied denied and deprived the petitioner of his rights of freedom of speech, of press and of worship of Almighty God contrary to the

aforesaid Amendment to the United States Constitution. (R. 2-4) The said Municipal Court duly considered and passed upon such questions and specifically held that the ordinance was applicable and that petitioners were not denied their rights of speech, of press and of worship. R. 2-4.

At the close of all the evidence on the trial de novo in the Circuit Court before the judge, without a jury, on October 25, 1940, the petitioners duly filed in writing their motion to dismiss the charges on the grounds that the ordinance in question under which the complaints had been filed had no application to the facts and that as applied was void and unconstitutional in that it deprived the petitioners of their rights of speech, of press and of worship contrary to the Fourteenth Amendment to the United States Constitution. (R. 3-5) The Circuit Court denied the motion to dismiss and held that the ordinance properly covered the petitioners and as construed and applied did not deprive the petitioners of said rights contrary to the Constitution and was therefore constitutional. R. 8, 9.

Also, petitioners duly filed their request for findings that the ordinance did not apply and for claims or declarations of law that if applied it would not deprive petitioners of their constitutional rights contrary to the Fourteenth Amendment to the United States Constitution. These requests were likewise denied.

In their motion for new trial duly filed in the Circuit Court complaint is specifically made as to the action of the court in overruling the motion to dismiss and refusing the above requests and that the judgment was contrary to law. R. 7, 8.

These federal questions were properly and duly preserved by the petitioners in harmony with the practice of the State of Arkansas.

Through the appeal taken from the Circuit Court to the Supreme Court of Arkansas and the entire record of the case, the specific points of law or federal questions above described were urged in the proper manner by petitioners

in said Supreme Court of Arkansas.

The Supreme Court of Arkansas specifically overruled each of the claims of law made by petitioners and overruled each federal question presented to it in due form by petitioners and specifically held that the ordinance was applicable and that the petitioners were not denied their rights of freedom of speech, of press and of worship contrary to the Fourteenth Amendment to the United States Constitution. (R. 30-37) [Opinion]

Therefore there are presented to this Court for review substantial Federal questions as follows:

Is the ordinance in question as construed and applied by the court below violative of the Fourteenth Amendment to the United States Constitution in that it abridges and denies petitioners' rights of freedom of speech, of press and of worship of Almighty God secured and included within the "due process" clause of said Amendment?

Specification of Errors to Be Urged

Petitioners assign the following errors in the record and proceedings in said cause.

The Supreme Court of Arkansas committed reversible error in failing to hold that:

1. The ordinance unreasonably and unlawfully denies and abridges petitioners' right of freedom to worship Almighty God as by Him commanded in His written Word and according to dictates of petitioners' conscience, contrary to the United States Constitution, Fourteenth Amendment, Section 1.

2. The ordinance unreasonably and unlawfully denies and abridges petitioners' right of freedom of press, contrary to the United States Constitution, Fourteenth Amendment, Section 1.

Summary of Argument

The decision below is based on a false premise; that is to say, that freedom of press extends only to "free" or gift distribution of literature, and that the constitutional safeguard does not protect SALE of literature or the simultaneous distribution of literature and acceptance of contributions to aid in producing and distributing more like literature.

Petitioners are ordained ministers of Jehovah God regularly and exclusively engaged in preaching the gospel, and their conduct is an act of worship of Almighty God, Jehovah, not included, either expressly or by inference, within terms of the ordinance.

Acceptance of contributions for literature used to preach the gospel is collateral and secondary to the main object of petitioners to preach the gospel.

Ambassadors or ministers of Almighty God and Christ Jesus cannot be licensed or taxed by the State for the performance of their duties as such without unlawful and unconstitutional joinder of State and Church.

Exercise of the civil right to freely worship Almighty God under the constitutional safeguard cannot be taxed or licensed because the 'power to tax is the power to destroy' the right.

The ordinance as construed and applied deprives petitioners of their right of freedom to serve, or worship, Almighty God by informing others through distribution of God's recorded Word and recorded explanations thereof, in obedience to God-given commands and according to dictates of petitioners' conscience.

The ordinance as construed unlawfully and unreasonably discourages, hinders and restricts circulation and distribution of pamphlets and other literature containing information and opinion when, incidentally to distributors' main purpose, contributions are accepted by them to defray cost of distribution.

The ordinance as applied is void because it restricts and prohibits *free* distribution of pamphlets and other literature containing information and opinion.

Exercise of the CIVIL RIGHT of "press activity", as distinguished from exercise of PRIVILEGE competitively to transact commercially gainful business, cannot be licensed or taxed because to permit is to confer the 'power to destroy' the CIVIL RIGHT.

The ordinance in question is not regulatory in its aim and nature and is not a general taxing law contemplated by the United States Supreme Court in *Grosjean* v. *American Press Co.*, 297 U. S. 233, and is distinguished from decisions relied upon by respondent.

The license tax is arbitrary, discriminatory and unreasonable and has no fixed standard.

The ordinance as construed and applied unlawfully denies and abridges petitioners' right of freedom of press.

The license tax in question is a direct burden upon distribution, which must at all times be left free and unhampered. The ordinance in question cannot be distinguished from legislation outlawed by this Court in *Lovell* v. *City of Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Grosjean* v. *American Press Co.*, supra; *Real Silk Hosiery Mills* v. *City of Portland et al.*, 268 U. S. 325, 335-336; *Sabine Robbins* v. *Shelby Co. Tax'g Dist.*, 120 U. S. 489, 494-496.

ARGUMENT

The ordinance of the City of Fort Smith in question is unconstitutional as construed and applied to petitioners because they are thereby deprived of and denied their rights of freedom of speech and of press and freedom to worship ALMIGHTY GOD, contrary to Section 1 of the Fourteenth Amendment to the United States Constitution, and because said ordinance is a direct burden upon such rights.

The Supreme Court of Arkansas manifestly has fallen into the same pit of error as did the trial court when considering the issues involved as a result of an unsuccessful attempt to jump the broad gap between—

a) police power authorizing taxation, license and regulation of sale of ordinary articles of merchandise upon the streets or from house to house, and

b) the occupation or activity of distributing on streets or at homes of the people literature containing information and opinion (simultaneously inviting and accepting money contributions to aid such work), protected by the Constitution against all sorts of State encroachment.

This gap between the two cannot be bridged or leaped over by law.

The Court's entire decision is based upon the false premise that there is no distinction between "selling" *literature* and selling ordinary articles of merchandise.

It is also based on the assumption that the license tax here is one of the ordinary forms of taxation for support of government, when, as a matter of fact, the ordinance, on its face and as construed and applied, constitutes and is

a *direct burden through license tax* upon circulation and distribution—th very life of "freedom of the press".

In all fairness to the court and in the interest of aiding the court in protecting the people of Arkansas against the assault against civil liberties made by respondent in its argument below under the guise of innocence, this brief is prepared and filed.

Respondent contends that a proper construction of the ordinance and the activity of petitioners is that it covers their activity and that said activity is "selling of merchandise" within the meaning of the ordinance. We submit that the weight of authority cited leads to and compels the opposite conclusion. Indeed this is the only construction that can be given it without having the ordinance come into collision with the Fourteenth Amendment. The only way to save the ordinance is to construe it so as not to cover petitioners' activity.

Respondent overlooks entirely the reasoning of this Court in *Schneider* v. *State*, 308 U. S. 147, where Mr. Justice Roberts said:

> "... Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In *Hannan* v. *Haverhill*, 120 F. 2d 87, the court said:

> "... Restrictions properly applicable to hawkers and peddlers selling ordinary articles of merchandise on the streets might not be appropriate to regulate the sale and distribution of literature of the sort offered for sale by the plaintiffs."

In the case at bar, the license tax provided for, as ap-

plied, is not at all different from the tax struck down in the case of *Grosjean* v. *American Press Co.*, 297 U. S. 697, 713-716. There the tax was based on gross receipts of the newspaper with circulation over 20,000 copies per week. Here the ordinance provides for dealers and for license tax for agents selling merchandise. Pamphlets, periodicals and newspapers are included within the meaning of the term "merchandise" by the trial court.

It is a well-known fact (of which this Court will take judicial notice) that the principal method of circulation and distribution of the large newspapers and national periodicals and magazines, weekly and monthly, is by newsboys and men, both on the streets and from house to house throughout the entire nation. This is particularly true with respect to *sale* of magazines such as "Collier's", "The Ladies Home Journal," "The Saturday Evening Post" and "Liberty". This has been the principal means of distribution of pamphlets, especially since their original use and to this day.

While casual consideration might lead one to believe that the ordinance in question is one of the 'ordinary forms of taxation for support of the government', yet a more careful consideration thereof conclusively shows that, according to construction of the Arkansas courts, it is adroitly aimed at *circulation* and can be misused to utterly destroy distribution of literature containing information and opinion.

The ordinance is of the common type *prohibiting* peddling without a license. Price for license ranges from $1 for one day upward. It also provides that persons peddling or selling upon the streets shall be required to secure a license at fees specified.

It purports to be a revenue-raising enactment.

Its real aim is, obviously, to *protect* from unwanted competition merchants maintaining locally established businesses. It relates exclusively to commercial enterprises conducted for pecuniary gain. Nevertheless, the ordinance is

of the same character as ordinances struck down when applied in other cases where the benevolent, non-commercial, non-competitive activity of Jehovah's witnesses has been involved.

It is a fundamental proposition that freedom of speech, of press and of worship is secured by the due process clause of the Fourteenth Amendment.

The undisputed evidence is that petitioners were and are ordained ministers of Jehovah God, and that their *way* of worshiping Almighty God is to preach the gospel from house to house and on the streets by distributing literature explaining God-given prophecies of the Bible.

Preaching of the gospel by them *in this manner* is not for the private, personal benefit of the individuals so preaching, or the benevolent corporation printing the literature distributed by said individuals. On the contrary, the purpose, aim and effect of their dissemination of such information through distributing said literature is to enlighten and benefit persons willing to receive and study that literature.

The undisputed evidence shows that no one connected with the printing or distributing of the literature receives or makes any private, pecuniary profit; and that the entire activity is strictly non-commercial, non-profit and non-competitive in nature and aim. And although money contributions are received by persons distributing the literature to aid in defraying cost of producing and distributing more like literature, such acceptance of contributions is wholly and purely *collateral, incidental,* secondary.

The undisputed evidence shows that no profit or personal gain results, and much literature is given away free by the distributors on condition that recipients read and study same.

Neither respondent nor the courts can say that this is not a proper *way* to worship Almighty God. Jehovah God alone judges His servants, as it is written:

"Who art thou that judgest another man's servant?

to his own master he standeth or falleth. Yea, he shall be holden up: for God is able to make him stand."
THE BIBLE, Romans 14:4

Also, Thomas Jefferson, in his preamble to the Virginia Statute for Religious Freedom, correctly recites—

"that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty"

and then declares

"that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

The foregoing true rule was quoted with approval in *Reynolds* v. *United States*, 98 U. S. 145, 162.

Also, in *Commonwealth* v. *Lesher*, 17 S. & R. 155, the Chief Justice of the Supreme Court of Pennsylvania said that the right of conscience is—

"A right to worship the Supreme Being according to the dictates of the heart. To adopt any creed or hold any opinion whatever on the subject of religion; *and to do or forbear to do any act* for conscience' sake, the doing or forbearing of which is not prejudicial to the public weal." [Italics added]

As long as the act of worship by an inhabitant of this land—be he a clergyman, or one of these petitioners, or any other person—does not infringe the law of morals or the right of property of others, the judiciary or any administrative agency is precluded from invading the field of opinion and right practice to say that a given activity is not in fact

an act of worship, or "preaching the gōspel".

To "preach" means to proclaim a message.

"Preaching the gospel of the kingdom of God" means proclaiming to others the Scriptural truths of and concerning Jehovah God and His kingdom, The Theocracy, under Christ Jesus.

To be *ordained* thus to minister or serve merely means to be appointed, by the proper authority, to a position or office to perform duties specifically assigned. Jehovah's witnesses being selected by Almighty God, JEHOVAH, it follows that Jehovah is the authority who ordains the servant or minister, as it is written at Isaiah 42:1; Isaiah 43:10-12; Isaiah 61:1-3; John 15:16. Those and other Scriptures clearly state the commission of authority given by Almighty God through His Son Christ Jesus to persons on earth who are servants, or ministers, of Jehovah.

Since Jehovah's witnesses operate in a legal and orderly way through their corporate representative the Watchtower Society, they also possess an earthly ordination.

The court below wrongly justified respondent's invasion of petitioners' right, by holding that "a preacher" must pay a license tax when he elects to preach by disseminating printed information on the streets and simultaneously receives money contributions to carry forward such work.

Respondent's argument, in effect, interprets *privately* (i.e., for respondent's *purpose* rather than for the purpose of the Teacher, Christ Jesus) the language of the Lord Jesus—Render to Caesar things that are his, and to God things which are His' (Matthew 22:21)—to mean that a minister under contract with *the Creator* can be required to violate that contract and his conscience by conforming to the will of *a creature* (i. e., the State) through asking for and obtaining a license before performing acts which *the Creator* in His written Word commands His ministers to do. Because this direct burden violates God's law it cannot be properly deemed one of the demands of "Caesar" to be

complied with. *Private* misinterpretation of the Scriptures is 'wresting the Word of God' (2 Peter 3:16); for "no prophecy of the scripture is of any private interpretation". —2 Peter 1:20.

By recording the course of action of His faithful ministers (Hebrews, chapter 11, and other Scriptures), Almighty God has made manifest His interpretation, i. e., the true construction of the Master's words (Matthew 22:21) concerning the obligation of all persons of good-will toward Almighty God with respect to conflicting illegal and wrongful demands of "Caesar". The rule followed by every sincere servant of Jehovah and of Christ Jesus is that such servant willingly and joyfully conducts himself in an upright manner, obeying every law of the land which is not in conflict with JEHOVAH'S law, which is supreme, eternal. This position is exactly like that approved by Blackstone and Cooley. See Blackstone *Commentaries* (Chase, 3d ed.), pages 5-7; Cooley, *Constitutional Limitations*, 8th ed., page 968. As to human demands that conflict with the Creator's perfect commandments to His ministers, the God-given rule is that announced by Jesus Christ's apostle Peter: "We ought to obey God rather than men." "Whether it be right in the sight of God to hearken unto you more than unto God, judge ye." —Acts 5:29; Acts 4:19.

Requiring any minister of Almighty God to pay a tax before he preaches by disseminating God's message in printed form (and simultaneously receives money contributions to aid such work) conflicts directly with the law of Almighty God, as well as with the Federal Constitution, because it is a *direct burden*.

A minister of the gospel cannot be licensed to *perform acts* of worship of Almighty God. Furthermore, the ordinance does not mention or contemplate ministers.

The constitutional *right* to serve Almighty God cannot be taxed or licensed. Under existing *American* law, serving God the Creator in conformity with His written commands

is not a "privilege" merely, but a *right*.

As construed, the ordinance licenses *acts* of worship; that is to say, preaching the gospel in obedience to God-given command by distributing literature explaining the Bible. To suffer or permit such taxing or licensing is to authorize and encourage an unlawful joinder of "state and church".

The public street is the natural and proper place to preach the gospel *in the manner* done by Jehovah's witnesses. Here, even more particularly, petitioners' *way* of worship by preaching the gospel *from house to house* is equally proper. *Schneider* v. *State*, 308 U. S. 147.

The ordinance is not *regulatory* in nature. A licensee having paid the specified fee and so obtained a license would then be free to "peddle" in Fort Smith at any time, in any place, and in any manner, wholly unrestricted by any provision in the ordinance. Manifestly, the power to license conferred thereby is the 'power to destroy'. The licensing authority is arbitrarily and wrongfully vested with the "right" and "duty" to both *let* and *prohibit*.

Wholly *incidental* to petitioners' main activity of preaching the gospel is their taking of money contributions. Their activity is not *aimed* or designed to accumulate pecuniary gain. There are no exceptions shown to exist warranting interference, rightly, with petitioners' *acts* of worship by application of the ordinance.

The law of Almighty God is supreme, and when a law of the state requires His minister or ambassador to secure a license as a condition precedent to the doing of what Jehovah commands him to do, the minister must obey God and refuse to apply for a license. Should he compromise and secure a license he must suffer everlasting destruction at the hand of Almighty God.

In such a conflicting situation the Constitution requires that ordinances of man (when applied to restrict or prohibit harmless and beneficial *acts*) yield to conscience of the in-

dividual molded by Jehovah God and His perfect law.

Admittedly, no clergyman who represents any of the respective religious organizations that function constantly within Fort Smith has ever been required to comply with the ordinance. When such clergyman, in pursuit of his ecclesiastical profession, receives money from parishioners upon whom he calls at their homes to supply to them prayer books, candles, or other religious paraphernalia commonly and regularly so provided by clergymen he thereby does not qualify as a peddler, subject to being licensed under this ordinance.

Freedom of conscience and of worship are not limited to right of establishment, maintenance and use of an edifice in which to sermonize or from the pulpit of which to harangue the people with vain babblings of politics, society or science falsely so called. That constitutional liberty includes the right of every inhabitant of this land to teach and practice Bible truths by following in the footsteps of Jesus Christ. From *Watson* v. *Jones*, 80 U. S. 679, 728, we quote:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

The literature in question relates exclusively to Biblical matters, it explains God-given prophecies recorded centuries ago in Holy Writ and which are now being fulfilled. It shows how, according to the Bible, the time is near at hand when JEHOVAH, the Almighty God, will completely destroy His chief enemy, Satan, and also Satan's entire organization invisible and visible consisting of commercial, political and ecclesiastical elements, in the "battle of that

great day of God Almighty" at Armageddon (Revelation 16: 13-16); which destructive *act of God* shall be immediately followed by continuing growth and irresistible expansion of His Theocratic Government which alone shall prevail eternally in all the earth, to bring peace, joy, prosperity, happiness and endless life to all survivors of that most terrible battle of all time, and eventually also to many who have died in centuries past and who shall by the power of Almighty God be raised from the dead to live upon earth in obedience to His Government under Christ Jesus.

No part of the content of such literature advocates overthrow of government by force or violence or by unlawful means, nor does it in any way interfere with the governments of various nations of earth, in regard to every one of which governments Jehovah's witnesses are strictly neutral.

Thus it can be readily seen that the literature does not relate to any commercial or selfish subject matter. See R. 15-24, 26, 27.

The activity of Jehovah's witnesses in demonstrating this literature in the manner that they do is not a competition with any business of the city's local merchants, whom the ordinance is obviously designed to protect.

It is the misconstruction and misapplication of the ordinance which makes it unconstitutional. The undisputed evidence shows that press activity and acts of worship have been encroached upon unlawfully and that petitioners' have been thereby deprived of their liberty constitutionally secured against State invasion. See

Yick Wo v. Hopkins,
118 U. S. 356, 372
Oney v. City of Oklahoma City,
120 F. 2d 861
Dahnke-Walker Milling Co. v. Bondurant,
257 U. S. 282
Poindexter v. Grunhow,
114 U. S. 270

St. Louis I. M. & S. Ry. Co. v. Wynne,
224 U. S. 354

Kansas City Sou. Ry. Co. v. Anderson,
233 U. S. 325

Whitney v. California,
274 U. S. 357

Concordia Fire Ins. Co. v. Illinois,
292 U. S. 535, 545

See, also, *Hague* v. *C. I. O.*, 101 F. 2d 774, 786; *People ex rel. Doyle* v. *Atwell*, 232 N. Y. 96; 25 A. L. R. 107; 133 N. E. 364.

This type of ordinance has been repeatedly held not to apply to the activity of Jehovah's witnesses because they are ordained ministers of Almighty God, preaching the gospel of His Kingdom. Their taking of money contributions is *incidental* to their main activity and therefore does not constitute peddling of merchandise. Obviously and undeniably, *their* use of the printing press as an adjunct by means of which the gospel message is made suitably and conveniently available to persons willing to receive the same when distributed in printed form renders such manner of *preaching* none the less an activity entirely *outside* of the "other personal activities" rightly placed within taxing or regulatory field covered by ordinary peddlers' and hawkers' ordinances designed exclusively to govern commercial transactions. See

Schneider v. State [New Jersey],
308 U. S. 147
Thomas v. City of Atlanta [Ga.],
1 S. E. 2d 598
Semansky v. Stark,
199 So. 129; 196 La. 307
Cincinnati v. Mosier,
22 N. E. 2d 418

State [South Carolina] v. Meredith,
15 S. E. 2d 678
Donley v. City of Colorado Springs,
40 F. Supp. 15
Commonwealth v. Reid et ux.,
20 A. 2d 841
Tucker v. Randall,
15 A. 2d 324; 18 N. J. Misc. 675

Streets are natural and proper places for gift distribution or *sale* of literature. In Holy Writ servants of Almighty God are counseled to disseminate right information in such proper places. (See Proverbs 1:20, 21; Luke 13:26; 10:10; 11; 7:11-16.) Restrictions or ordinances such as this Fort Smith ordinance, properly applicable to hawkers and peddlers of ordinary articles of merchandise, are neither appropriate nor available either to prohibit or to regulate *sale* or gift distribution of literature on the streets or from house to house. See

Hannan v. City of Haverhill [Mass.],
120 F. 2d 87
Schneider v. State,
supra
Cantwell v. Connecticut,
310 U. S. 296

"As said in *Lovell* v. *City of Griffin*, supra [303 U. S. 444], *pamphlets* have proved most effective instruments in the dissemination of opinion. And perhaps *the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people*. . . . To require a censorship *through license* which makes impossible the free and unhampered distribution [by gift OR SALE] of pamphlets strikes at the very heart of the constitutional guarantees." (Italics added) *Schneider* v. *State*, supra; see, also, *Lovell* v. *City of Griffin*, supra.

The Fort Smith ordinance is used here to encumber "the press" and practically deny distribution. The burden of its provisions falls upon the distributor. It is manifest that the ordinance is *not* regulatory, because one securing a license is then at liberty to go anywhere within the city that he pleases, at any time, and *sell* or give away literature in any manner and without limitation.

A case directly in point is *Vermont* v. *Greaves*, supra, decided Nov. 5, 1941. There the Supreme Court of Vermont said:

> "... respondent, Elva Greaves, is charged with a violation of section 22 of chapter 21 of the Rutland City ordinances as amended. Briefly stated, the offense alleged is that on, to wit, the 19th day of April, 1941, at the City of Rutland, the respondent did 'carry on the business of "peddler" by selling pamphlets for money without obtaining a license from said City of Rutland so to do, ...' Trial was by jury in the Rutland Municipal Court, a verdict of guilty returned, judgment entered thereon and the case is here upon exceptions by the respondent.
>
> "The parts of the ordinance in question which are here material are as follows: 'No person shall carry on the business of ... peddler ... within the city, ... without first obtaining a license therefor as provided in this chapter, ...'
>
> "... respondent's motion for a directed verdict was upon the grounds that she was not a peddler but did disseminate teachings of the Bible by distributing books, booklets, pamphlets and magazines for which she received money contributions; that the undisputed evidence shows that she is not guilty and also upon the grounds that the ordinance in question as applied to her is contrary to the provisions of both the Federal and State Constitutions in that she has thereby been deprived of her rights as to freedom of speech, freedom

of press and freedom of right to worship Almighty God. . . .

"The respondent is an ordained minister of a . . . class . . . designated as 'Jehovah's witnesses'. As such she believes that she is commanded by the Almighty to spread the Gospel as she and other members of this organization believe it to be and that it is her duty to do so. She did this by publicly taking positions on the sidewalks and streets in the City of Rutland, equipped with a magazine bag and several magazines known as the 'Watchtower' and 'Consolation'. As people passed she would call out some statement referring to religion and if any person gave attention and wished a magazine she sold it to him for five cents which was no more than enough to cover the cost of publishing same. She sold several of these in this manner on the day mentioned in the complaint. The object of this distribution of magazines was to place in the hands of the people in general true Biblical teachings as she understands them and believes them to be and not for the purpose of any financial gain or material personal benefit whatsoever. She had no license from the City of Rutland to carry on therein the business of peddler.

"Section 24 of this ordinance provides that the fee for a peddler's license shall be from $10. to $200., depending upon the manner of travel of the applicant and the capacity of the vehicle used to transport the goods he desires to sell.

"There is no claim that the printed matter in the magazines in question was obscene or otherwise objectionable. . . .

"Whether the license fee with which we are concerned is considered as a license fee or a license tax, its effect upon circulation of these magazines is the same in either case. In considering the constitutional question here this ordinance must be tested by its

operation and effect rather than by its form. Near v. State of Minnesota, 283 U. S. 697, 708; Henderson v. Mayor, 92 U. S. 259, 268. Therefore what is stated by the United States Supreme Court in the case of Grosjean v. American Press Company, 297 U. S. 233, . . . has great weight in determining the question in the case at bar. . . .

"Freedom of the press secured to the people of the United States by the First and Fourteenth Amendments to the Constitution applies not only to printed matter circulated without charge to the recipients but it also *applies when a charge is made for it.* Grosjean v. American Press Co., supra; Lovell v. City of Griffin, supra.

"It is true as the State contends that within limits permitted by law a municipality may enact regulations in the interest of public safety, health, welfare or convenience. Therefore, we now come to the question as to whether this ordinance as applied to the facts in this case is a valid regulation.

"In every case this power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the freedom protected by the United States Constitution. Cantwell v. State of Connecticut, 310 U. S. 296; Schneider v. State (Town of Irvington, N. J.), 308 U. S. 147.

"As applied to the facts in this case this ordinance *makes no provision regulating the manner of carrying on the business of peddlers* within Rutland City. The respondent having paid $10 and so *obtained a license would then have been free to peddle* these magazines in the City of Rutland at any time, in any place, and in any manner, wholly unrestricted by any provision in the ordinance. In short, her freedom to peddle these magazines there would be as complete as though the ordinance did not exist. To enforce the terms of

this ordinance under the circumstances of this case would be to *compel the respondent to pay* a fee of $10 in order *that she might avail herself of a privilege secured to her* by the United States Constitution. Also that this requirement of the ordinance, if enforced here, would operate as a *restraint upon the circulation* of the magazine in question is too plain to need further discussion. Grosjean v. American Press Co., supra. It follows that as applied to the facts here this ordinance *cannot be justified as a valid regulation.* Grosjean v. American Press Co., supra; Cantwell v. Connecticut, supra; Lovell v. City of Griffin, supra.

"The only question presented here and therefore the only one considered is the application of this ordinance to the facts in this case. The fact that when so applied the ordinance is unconstitutional does not determine that it would be invalid for that reason when applied to other and different facts. Whitney v. People of the State of California, 274 U. S. 357, 378; Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289.

"We hold that this ordinance as applied to the respondent under the circumstances shown by the evidence in this case is unconstitutional because when so applied *it abridges rights of the respondent* as to freedom of the press secured to her by the First and Fourteenth Amendments to the United States Constitution.

"Judgment reversed and the respondent is discharged." [Italics added]

"Freedom of press" is not confined to distribution of literature free of charge. The constitutional safeguard extends likewise to protect those who *sell* literature, and most certainly includes the right to receive money contributions (tendered by or invited to be given by willing ones receiving literature at the same time) *incidental* to the main activity of preaching the gospel.

Hannan v. City of Haverhill,
supra

On March 17, 1942, the Illinois Supreme Court, in *City of Blue Island* v. *Kozul* (one of Jehovah's witnesses), declared unconstitutional an ordinance very similar, if not identical, to the ordinance involved in the case at bar. That Illinois case is unreported at time of this writing and is quoted from at length for the convenience of this Court. Chief Justice Murphy, speaking for the court, said:

"The parts of the ordinance material to the questions here involved are as follows: 'Section 1. Definition of Peddler—Peddlers required to be Licensed. That every person, firm or corporation who shall sell or offer for sale, barter or exchange at retail any goods, wares or merchandise of any kind whatsoever, by traveling from place to place in, along and upon any of the streets of the city of Blue Island . . . whether to regular customers or not, shall be deemed a peddler and shall before engaging in said business, obtain a license as a peddler as hereinafter provided.' . . .

"The magazines sold by the defendant would come within the term 'goods, wares and merchandise' used in the ordinance. *Village of South Holland* v. *Stein*, 373 Ill. 472. . . .

"Recent pronouncements of the Supreme Court of the United States make it obvious that the ordinance here in question, as applied to the sale and distribution of the magazines and leaflets by the defendant is unconstitutional and a violation of the right of freedom of speech and of the press. *Lovell* v. *City of Griffin, supra; Schneider* v. *Town of Irvington, supra; Grosjean* v. *American Press Co., supra; Cantwell* v. *Con-*

necticut 310 U. S. 296, 84 L. ed. 1213; *Hague* v. *C. I. O.*, 307 U. S. 496, 83 L. ed. 1423. . . .

"The ordinance of the city of Blue Island, as applied to the defendant, can not be sustained as a revenue measure. The United States Supreme Court in *Grosjean* v. *American Press Co., supra*, reviews the history of the long struggle which took place in England between the government and the proponents of a free press. The methods anciently used to control the press were censorship, license and taxation. It is obvious that through license and taxation, as well as by censorship, freedom of speech and of the press can be effectively curtailed and even denied. . . . The framers of the first amendment to the United States Constitution were familiar with the long struggle of the press in England to be rid of the license taxes and the stamp taxes imposed by the government to curtail and limit the freedom of the press, and the first amendment prohibits any form of restraint on the publication or circulation of printed matter.

" . . . Liberty of circulating is as essential as to the freedom of the press as liberty of publishing. Without circulation the publication would be of little value. (*Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877.) The license tax in the *Grosjean case* was held invalid because of its direct tendency to restrict circulation.

" . . . The right to freely print and circulate applies not only to printed matter circulated without charge to the recipients, but it also applies when a charge is made for it. (*Grosjean* v. *American Press Co., supra; Lovell* v. *City of Griffin, supra.*) . . .

"The city contends that in some of the cases cited the ordinance provided for censorship through licenses or permit and gave the certifying officer the power to reject or deny the application at his discretion on consideration of the moral character of the applicant or the nature of his project, whereas, the ordinance of the city of

Blue Island did not provide for censorship but gave the applicant a right to a license on payment of the required fee. It can, however, make no difference whether the ordinance provides for censorship through licenses and permit or whether the ordinance merely provides a license fee or license tax on the privilege of publishing and circulating printed matter. In either event the effect is that there is an abridgement of the freedom of the press.

"The publishers and distributors of newspapers, magazines, pamphlets, circulars, books or other printed matter are not immune from the ordinary forms of taxation for the support of the government, but they can not be compelled to purchase, through a license fee or a license tax, the privilege freely granted by the constitution. . . .

"The ordinance is not regulatory. As applied to the facts in this case, the ordinance makes no provision regulating the manner of carrying on the business of peddlers in the city of Blue Island. The defendant's right to a license on the payment of the required fee or tax was absolute. If the defendant paid the $25 for a year, or $4 for a day and so obtained the license she would then have been free to peddle the magazines in the city of Blue Island during the paid license period at any time, in any place and in any manner, wholly unrestricted by any provision in the ordinance. Her freedom to peddle the magazines would then be as complete as though the ordinance did not exist. The ordinance is purely a fee or tax measure, and under the circumstances in this case its effect is to compel the defendant to pay a fee or tax of $25 per year or $4 per day to exercise a privilege freely guaranteed to her by the constitution of the United States as well as by the constitution of this State. That this ordinance as applied to the facts in this case would operate as a restraint upon the circulation of the magazines in ques-

tion is self-evident. If the defendant should be unable to pay the required fee or tax, circulation and distribution on the streets of Blue Island was prohibited and denied. *Grosjean* v. *American Press Co., supra.* . . . "

In *Commonwealth* [Borough of Clearfield, Pa.] v. *Reid et ux.*, supra, involving an ordinance very similar to that of Fort Smith, President Judge Keller of Pennsylvania Superior Court said:

> "The historical reference to 'pamphlets' in that [Lovell v. City of Griffin, supra] opinion and in other opinions of that Court (Schneider v. State (Town of Irvington), supra, p. 164; Thornhill v. Alabama, 310 U. S. 88, 97; Grosjean v. American Press Co., 297 U. S. 233, 245-250, etc.) is *not limited to 'pamphlets' which are distributed without cost.* Every student of history knows that the 'pamphlets' referred to by Chief Justice Hughes in his opinion, and by Mr. Justice Sutherland in the Grosjean case, were not for the most part circulated gratis, but were distributed to subscribers or *sold.*" [Italics added]

See, also, *The Encyclopædia Britannica,* Vol. 20, Pamphlets, pp. 659-660.

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation *comprehends every sort of publication which affords a vehicle of information and opinion.*" (Italics added) *Lovell* v. *City of Griffin,* supra.

It is of vital importance to protect the essential liberty of freedom of the press and freedom to worship Almighty God, from every sort of infringement. See, also,

State [Fla.] ex rel. Wilson v. Russell,
1 So. 2d 569, *particularly* opinion of
Chapman, J., specially concurring
State [Fla.] ex rel. Hough v. Woodruff,
2 So. 2d 577

Petitioners' freedom to worship Almighty God has likewise been abridged and denied by respondent. *Cantwell* v. *Connecticut*, supra.

Other cases involving Jehovah's witnesses and in which application of ordinances similar to the Fort Smith ordinance has been held unconstitutional are:

Commonwealth [City of Coatesville, Pa.] v. Schuman [Schieman] (January 29, 1937), *very specially noteworthy*,
189 A. 503; 125 Pa. Superior Ct. 62
Kennedy v. City of Moscow [Idaho],
39 F. Supp. 26
Donley v. City of Colorado Springs,
supra
Zimmermann v. Village of London [Ohio],
38 F. Supp. 582
South Holland (Village of) v. Stein,
26 N. E. 2d 868; 373 Ill. 472
Ex parte Walrod
120 P. 2d 783
Ex parte Winnett et al.
121 P. 2d 312
Borchert et al v. City of Ranger (Tex.) et al.
42 F. Supp. 577

Here, too, the burden is imposed upon the "distribution" or "circulation" end of publication which, under the constitutional protection, is intended to be left unhampered and unrestrained by all forms of license and permit laws. Under the Fort Smith ordinance, every newsboy or other per-

son distributing any pamphlet, book or periodical is required to pay the license fee.

The license fee imposed is *not for the purpose of regulating* and paying necessary expense incidental to use of the streets, as was the *parade* license fee in *Cox* v. *New Hampshire*, 312 U. S. 569. There the fee collected was used in providing policing of *parades*. Here, however, no such aim or purpose exists. Here, ostensibly, the object appears to be *revenue raising*, but, really, the aim, purpose and *effect* or result is destruction of distribution or circulation, because the burden of tax is placed on the distributor.

Suppose a citizen interested in good government found that administration of officials in Fort Smith were corrupt and incompetent, and he desired to print a pamphlet making known such fact for the purpose of effecting a change of administration. If he prepared such a pamphlet and distributed it, either *gratis* or for a small charge, he would be required to get a license, and on failure to do so could be prosecuted and convicted.

Let us say that Nazis, Fascists and Japs were moving in secret to invade the borders of Arkansas, and some good citizen learning this fact printed millions of pamphlets or leaflets for distribution throughout Arkansas. In Fort Smith, under this ordinance, both he and every loyal citizen aiding him to distribute such printed matter could be convicted for their failure to pay the tax and secure a license. A modern-day Tom Paine or John Milton could not safely function with his pamphlets in Fort Smith.

The tax here in question directly encumbers and smothers distribution and circulation of literature; and if held to be valid, it could be used to destroy circulation. This is plain enough when we consider that if it were increased to a high degree, as it could be (*Magnano Co.* v. *Hamilton*, 292 U. S. 40, 45, and cases cited), it well might result in completely suppressing both distribution and even publishing to point of destruction.

As our further argument we here adopt in its entirety the opinion of Mr. Justice Sutherland in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244-251, and also the statement appearing in *Near* v. *Minnesota*, 283 U. S. 697, 707-716 et seq.

The ordinance is clearly *not regulatory*. The license tax provided for is not a general taxing law for support of government as contemplated by this Court. The ordinance throws the burden upon the pamphleteer or other distributor of limited means and thus stops circulation. A thousand distributors would be required to pay a huge sum to function under the ordinance. Under the same ordinance the one printer for the thousand distributors would be required to pay nothing. The unreasonableness of the ordinance license tax is manifest.

Therefore the argument and contention on the part of respondent that petitioners' main activity is peddling for profit is without support in law or fact and should be rejected.

This Court can take judicial notice of the clearly reasoned opinion of a humble city magistrate of this nation's largest and *greatest* municipality, involving an identical ordinance. Very early New York City's Magistrate Morris Rothenberg discerned and applied the American principles so ably set forth by Chief Justice Hughes in *Lovell* v. *Griffin*, 303 U. S. 444. In *People* v. *Max Banks* (July 20, 1938), 6 N. Y. S. 2d 41, Judge Rothenberg said:

> "I hold it to be an infringement of the First and Fourteenth Amendments to the Constitution of the United States guaranteeing liberty of the press to require the payment of a license fee for the privilege of *selling a pamphlet on the public streets* and to impose a penalty of fine and imprisonment for violation of the section mentioned.
>
> "In applying the principle laid down in the Gros-

jean case to the facts in the Lovell case the Chief Justice said:

> 'The ordinance cannot be saved because it relates to distribution and not to publication. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." . . . The license tax in *Grosjean* v. *American Press Company*, supra, was held invalid because of its direct tendency to restrict circulation.'

"Following this reasoning it is clear that the imposition of a license fee or tax as a prerequisite to the *sale of pamphlets on the streets* has a direct tendency to restrict circulation, notwithstanding the fact that Article 6 of the Administrative Code [City of New York] permits free distribution of literature *on the public streets without restriction*. Free circulation depends as much and conceivably more upon the sale than upon free distribution, considering the cost involved in the free distribution of literature. Adequate circulation may only be rendered possible through *sale* defraying the cost of production. How effectively a license fee or tax may act as a curtailment upon *sale* and consequently upon circulation the Supreme Court in the Grosjean case said 'becomes plain when we consider that if the tax were increased to a high degree, as it could be, if valid . . . it well might result in *destroying circulation*'." [Italics added]

In *People* v. *Finkelstein*, 2 N. Y. S. 2d 941, also it was held that license tax ordinances of the City of New York very like the questioned license ordinance were unconstitutional as construed and applied to street distribution of literature.

Can Invasion of the Right Be Justified?

The remaining question is whether or not such invasion is justified under the exceptions allowed by the Court in *Watson* v. *Jones,* 80 U. S. 679, 728. No such exceptions appear in this record. Therefore the State Supreme Court had no authority to invade petitioners' rights by applying this ordinance.

Respondent, the trial court and the Arkansas Supreme Court wrongly contend that petitioners were engaged in a *commercial* activity. Not only is there no evidence to support such contention, but it is in total disregard of existing evidence that petitioners were preaching the gospel, and "did not *sell*" (R. 15-24, 26, 27), i.e., did not act for a *commercial* objective, did not aim to acquire pecuniary gain for themselves as in conducting a trade or business enterprise.

Wholly *incidental* to petitioners' main activity of preaching the gospel is the taking of money contributions. Other courts have specifically found that the taking of money contributions is entirely *incidental,* collateral, to the main purpose of preaching the gospel of God's kingdom, THE THEOCRACY. See

Donley v. City of Colorado Springs
40 F. Supp. 15
Zimmermann et al. v. Village of London (Ohio)
38 F. Supp. 582
State [S. Car.] v. Meredith
15 S. E. 2d 678
Cantwell v. Connecticut
310 U. S. 296
Semansky v. Stark
199 So. 129
Thomas v. Atlanta
1 S. E. 2d 598
Cincinnati v. Mosier
22 N. E. 2d 418

In each of the cases just cited the activity involved was that of Jehovah's witnesses.

Cases relied on by respondent in justifying the decision below involved general taxes and licenses affecting the gross proceeds of newspaper business, which tax and licensing provisions were not directed at, or a direct burden on, distribution of literature, or calculated on the basis of circulation; but which were entirely incidental and collateral thereto.

Here the license tax throws the burden on the distributor and is a direct encumbrance upon circulation.

The case of *Cook* v. *City of Harrison*, 21 S. W. 2d 967, 180 Ark. 546, is unsound and contrary to the great weight of authority, and is based upon a false premise. Furthermore, that case is, as it were, relegated to days of the horse and buggy antedating World War I. That opinion was delivered many years before the decisions in *Grosjean* v. *American Press Co.*, supra, *Lovell* v. *Griffin*, supra, *Schneider* v. *State*, supra, and *Cantwell* v. *Connecticut*, supra, which probably accounts for the error of the Arkansas Supreme Court.

In view of the broad, liberal, constitutional view taken by this Court, that *Cook* v. *Harrison* opinion and decision must be now held unsound, void.

In this connection we call attention to the fact that no appeal or petition for certiorari was presented to this Court in that *Cook* v. *Harrison* case. Therefore this Court did not pass on that case.

The license tax here cannot be distinguished from the type of law requiring a permit from a police chief or other authorized official in whom is vested discretion to grant or refuse the permit. This character of law is admittedly un-

constitutional. See *Lovell* v. *Griffin*, 303 U. S. 444, and *Schneider* v. *State*, 308 U. S. 147. The same prohibitive result or evil can be and is reached under the license tax law here through increasing the license fee so as to make it impossible for all, except the ultrarich, to exercise constitutional rights guaranteed to everyone. Thus the right of liberty and freedom secured to all by the Constitution would become the prerogative of the wealthy.

Indeed, one might be too poor to pay even the smallest possible license fee that may be fixed, and thus, by reason of his poverty, be refused the rights guaranteed him under the Constitution. The exercise of rights so vital to the maintenance of democratic principles is not and cannot be made dependent upon one's ability to raise sufficient funds wherewith to pay a license-tax fee as a condition precedent to the exercise thereof. To thus hold might and would deprive large segments of the population of the guarantee of their freedom. The results would be a substantial dissolution of the rights of the people and a serious impairment of equality of the inhabitants of this land, and would make indigence a basis for restricting freedom of civil rights.

The ordinance questioned here permits the people, in the exercise of their constitutional rights, to be divided into two classes: one class with worldly riches free to exercise the right of freedom of press and worship according to the dictates of conscience, and another class that is poverty-stricken to the point of being unable to purchase the required license to exercise their vital rights. Thus the ordinance is at war with the Constitution and is a short-sighted blow at the security of the people's liberties.

Laws which make unlawful the bringing of indigents into a state are unconstitutional and void. See *Edwards* v. *California*, 314 U. S. 160, 182-186; 62 S. Ct. 164, 166-170. The principle announced in that case makes such, by analogy, authority for petitioners here.

Like "Free Commerce"

The license tax here applied to the exercise of an admitted constitutional right can be likened to the various kinds of taxes that have been knocked down as being unconstitutional burdens upon interstate commerce.

Petitioners do not and can not rely upon the interstate commerce clause itself. However, by analogy, petitioners' exercise of the rights of "free press" and "worship" is entitled to *equal protection* against any direct tax burden, even as the right of "free commerce between the states".

The courts have held to be bad taxes and license fees constituting a direct burden against interstate commerce. Such cases, by analogy, show that a similar tax, which directly burdens the exercise of freedom of press and worship, is likewise bad.

This Court has declared often that license-tax laws and peddlers' license ordinances similar to the one here involved are unconstitutional when construed and applied to cover peddlers or agents selling from house to house or on the streets merchandise shipped from another state. See *Sabine Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 494-496; *Caldwell et al.* v. *North Carolina*, 187 U. S. 622, 624-632; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 510-513; *Dozier* v. *Alabama*, 218 U. S. 124, 126-128, and *Real Silk Hosiery Mills* v. *City of Portland et al.*, 268 U. S. 325, 335-336.

In these trying hours this Court will be equally as hasty and astute to protect the rights under the "Bill of Rights" and the Fourteenth Amendment to the Constitution as it is in sustaining the commerce clause, especially when human rights are threatened, as here, with destruction by the direct burdening of circulation and distribution, the very life of "free press".

Respondents say that because the state courts have passed on the validity of this and similar ordinances that this court and other federal courts do not have the right to

reach a contrary conclusion or enjoin the enforcement. We call attention to the fact that the New Jersey Supreme Court had passed on and approved the validity of the ordinance involved in the *Hague* case before the injunction suit was brought. This was a basis for an injunction rather than ground for denial. Such a holding constitutes a denial of constitutionally secured "civil rights". (See statement in footnote 23 of the opinion of Mr. Justice Roberts in the *Hague* case.) The courts of the States are not the sole custodians of the Constitution; and when any state court misconstrues the United States Constitution such court's holding is not binding upon any federal court called upon to "redress" the deprivation of civil rights by state courts.

It is a fundamental rule that the question of construction of a statute or ordinance and definition of its terms is for the State courts to determine and when they have construed the enactment such construction is binding upon the federal court. This rule is well settled and does not require citation of authority.

But *where a federal question is involved* the federal courts are not bound by the construction given the statute or ordinance by a state court.

Here a federal question is involved. This federal court cannot be forced to follow the arbitrary ruling of any state court that 'there is no federal question'.

The fact that there is a federal question causes the exception to the above rule. This Court must now determine whether the ordinance is unconstitutional and contrary to the Fourteenth Amendment as construed and applied by respondent.

In proof that the foregoing paragraph correctly states the rule, see *Scott* v. *McNeal*, 154 U. S. 34; *New Jersey* v. *Anderson*, 203 U. S. 483; and *Lindsey* v. *Washington*, 301 U. S. 397.

It has been clearly stated and held by this Court that it is not concerned with characterization or construction of

state legislation by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state in light of the Federal Constitution.

Corn Prod. Ref'g Co. v. Eddy,
249 U. S. 427
St. L. & S. W. Ry. Co. v. Arkansas,
235 U. S. 350
K. City & Ft. Smith Ry. Co. v. Botkin,
240 U. S. 227, 231
Mountain Timber Co. v. Washington,
243 U. S. 219, 237

The ordinance is also void because it vests arbitrary and discriminatory power in the licensing authority of the City of Fort Smith. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 372.

In today's perilous hours men's hearts are failing them for fear of what they see coming upon the human family. This great *fear* has driven rulers and judges of every land into desperation and perplexity, resulting in a breaking down of justice and morality. Notwithstanding the turbulence and the unparalleled strains and stresses of these momentous hours,

> "a court in the discharge of duty under our system is required to be oblivious to public clamor, partisan demands, notoriety, or personal popularity and to interpret the law fearlessly and impartially so as to promote justice, inspire confidence and serve the public welfare. . . . The perpetuity of democracies has as a foundation an informed, educated and intelligent citizenry. An unsubsidized press is essential to and a potent factor in instructive information and education of the people of a democracy, and a well informed people will perpetuate our constitutional liberties." (Chapman, J., concurring specially, in *State* [Fla.] *ex rel.*

Wilson et al. v. *Russell* [April 8, 1941], 1 So. 2d 569.)

See, also, "Freedom of the Press" (C. A. Peairs, Jr.), 28 Ky. Law Journal (May 1940) 369-410, an arresting review of the vital questions, concluding:

> "[pp. 409-410] . . . With the exception of a few noble liberals, who believe that 'liberty of the press means liberty for those with whom we disagree' [FOOTNOTE 126: "Felix Frankfurter, 37 Har. L. Rev. 1029, following the Holmes approach."], the sides taken in questions of this sort depend on whose ox is being gored. . . . The First Amendment, and allied provisions, may be mere nebulae in times of comparative natural harmony, but when the mind of a nation becomes aroused against a small minority, they do their greatest work."

During these hectic days a gigantic wave of prosecutions and persecutions against Jehovah's witnesses has swept over this "land of the free and home of the brave". Why? Sophistry and fine reasoning, without sound foundation, have subtly drawn some of the lower courts into the erroneous, un-American position of approving judgments of conviction denying liberty of conscience, of thought, of speech and of press, under the pretext or motive of 'safeguarding national defense interests'. Blind to the ultimate result of such shortsighted and hasty conclusions, such zealous but panicky members of the judiciary have unwittingly dragged segments, at least, of this nation closer to the brink of totalitarian rule.

The only factor which distinguishes this country as a republic with a democratic form of government, and therefore the only thing worthy of preservation from totalitarian aggression, is that American heritage epitomized as the "Bill of Rights". Once the freedom anchored and secured thereby is gone, the reason is lost for fighting Nazism and allied totalitarian tyranny.

In this hour of emergency even more than in times of

peace there rests upon this nation's courts and jurists—from the lowly magistrate to the Chief Justice—a *higher* duty to scrutinize, to weigh, to appraise the 'substantiality of reasons adroitly advanced in support of *regulation* of free enjoyment of fundamental personal rights', so as to guard against any and all encroachments. Why? The danger of loss, total and permanent loss, in such times as these is intensified a hundredfold.

Here, then, let deepest consideration be given to the *effect* of the challenged ordinance rather than merely to the cold black and white text of its provisions.

Before exercising its regal and judicial power, let this tribunal, this country's last bulwark of liberty, consider a profound expression made in another trying hour, in *Ex parte Milligan,* 4 Wall. 2, 120 (1866); and also the later dissenting words of Mr. Justice Sutherland:

> "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship . . . ? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."
>
> *Associated Press* v. *N. L. R. B.*
> 301 U. S. 103, 141

Conclusion

Among the oldest cases on the precise point now before this Court is the one recorded in the Bible book of Acts of the Apostles, chapter 5, beginning at verse twenty-six. Disciples of Jesus Christ were publicly informing the people, disseminating the truths of the Word of Almighty God in obedience to His command. Religionists were grieved and angered because God's truth was being proclaimed. The clergy and other religionists conspired against the publishers of the truth. Those conspirators instigated the arrest of the disciples, who were haled into the judgment hall. A high Roman court then sitting in Palestine heard that case. After hearing the evidence, one of the members of that court, Gamaliel, a learned counselor, arose and, addressing his fellow members of the court and all present, said:

> "Refrain from these men, and let them alone: for if this counsel or this work be of men, it will come to nought: but if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God."

This temperate and salubrious principle all right-minded persons always follow.

The Most High God, JEHOVAH, Himself counsels:

'Now therefore be wise, O ye kings: be instructed, ye judges of the earth. Serve JEHOVAH with fear, and rejoice with trembling. Kiss His Son, THE KING Christ Jesus, lest He be angry, and ye perish in the way, for His wrath will soon be kindled. Happy are all they that take refuge in Him.'—Psalm 2:10-12, *American Revised Version.*

This Court should reverse the judgment of the Arkansas Supreme Court and order the petitioners discharged, we confidently submit.

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